though the government had been sued for mandamus relief as Congress allowed under 18 U.S.C. § 923(d)(2) and 28 U.S.C. § 1361, and 3) even though Petitioner had no other avenue of relief available unless and until the government can be bothered to act.

The practical result of the District Court's ruling is that the government can fail to act contrary to the statute and avoid the consequences thereof which Congress put in place, thereby rendering mandamus relief a practical nullity. The government is thus free to drag its feet, wait for a suit to be filed, then issue a denial, thereby forcing an applicant out of court and into its administrative process, as if the government had complied with the statute all along. This is not what Congress intended in 18 U.S.C. § 923(d)(2).

The Court of Appeals reviewed this decision and found it without error.

III. Summary of the Argument

The federal licensing statute is clear and unambiguous. Title 18 U.S.C. § 923(d)(2) requires that "the Attorney General must approve or deny an application for a license within the 60-day period beginning on the date it is received." It is undisputed that the ATFE failed to approve or deny within 60 days. If the Attorney General fails to act within such period, "the applicant may file an action under section 1361 of title 28 to compel the Attorney General to act." It is undisputed that Petitioner filed a mandamus action after 60 days.

When the statute authorizes mandamus to compel the ATFE to "act," it means to 'act pursuant to mandamus' including a timely order to show cause why the application

ought not be granted. The authorization to "act" does not mean to act upon the application to either approve or deny same, nor can it since that authorization was to act within 60 days which time is then expired or until Petitioner files a mandamus petition, at his liscretion. Mandamas acts against the Attorney General and the ATFE so that they may not do any action to cure until a show cause is held.

It is Petitioner, not the ATFE, who enjoys discretion in the choice of forums in which he may seek a remedy for the government Respondent-Appellee's failure to act within 60 days. Petitioner need not exhaust administrative remedies because 18 U.S.C. § 923(d)(2) does not provide this requirement.

In the alternative, Petitioner has no administrative remedies to exhaust unless and until the government denies his license. But when Petitioner elects after 60 days to seek mandamus, the government must answer the petition and appear at a show cause hearing. It cannot simply deny the petition after the fact, force Petitioner from Court into its administrative processes with the future promise that *de novo* judicial review of the agency's decision is available under 18 U.S.C. § 923(f)(3), while denying the mandamus which is authorized under 18 U.S.C. § 923(d) is mooted and unavailable.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ under Rule 10 in Order to Settle an Important Question of Federal Law–i.e., Courts Do Not Possess Legislative Power.

It would be nice if a case on point were present. Petitioner identified one case under a previous statute. *Gager & Goldberg, Inc. v. United States*, 44 F.R.D. 477 (1968), was a case under the Federal Firearms Act, 15 U.S.C. § 903, the precursor and forerunner of the 1968 Omnibus Crime Control and Safe Streets Act (the Gun Control Act) which became effective June 6, 1968. The 1968 act expanded and modified the Federal Firearms Act. In *Gager*, the Court approved its jurisdiction in the nature of mandamus pursuant to 28 U.S.C. § 1361. The Court found that under the Fed.R.Civ.P. a complaint, seeking mandatory injunctive relief ordering the United States to issue Petitioner a gun dealer's license, could be interpreted to set forth a claim for relief on the ground that the government's determination refusing the license was arbitrary and wholly unauthorized by law and that mandamus relief would be appropriate. The government's determination here is no different.

The Court did point out, however, that under the Federal Firearms Act, Congress had not specified by statute any method for review of the government's determination. Petitioner points out that likewise under the Federal Firearms Act, neither had Congress provided for specific mandamus relief (thus explaining why *Gager & Goldberg, Inc.* sought injunctive relief under the Federal Rules).

Under the subsequent Gun Control Act of 1968, Congress took the Court's concerns to heart. Congress provided both for mandamus *and* for a method of reviewing the

government's denial of a license. Those provisions have been fully described and discussed above to the effect that Petitioner has been granted by Congress an election of remedies and where the United States fails to act within 60 days. Mandamus is appropriate and need not be conditioned on the exercise of another remedy regarding administrative review or unilaterally preempted by a denial after 60 days.

In short, the case stands at least for the proposition that a valid jurisdictional basis exists for a federal court to review the failure of the ATFE to act in regard to licensing pursuant to 28 U.S.C. § 1361.

Certiorari is sought in this matter to produce certainty and uniform application of the Federal Gun Control Act as it pertains to FFL applicants' rights to apply for a writ of mandamus upon the ATFE's failure to abide by the statutory deadline for providing a grant or denial of an application for a federal firearms permit. Judicial revision of the statute, already rewritten once by Congress, creates an impossible barrier to applicants. The Court's decision to destroy by construction the Congressional mandamus remedy by legislatively inserting an a-priori obligation to exhaust non-existent administrative remedies is a perverse result.

This case presents a narrow issue for resolution by this Court, namely, whether the district court should have ordered the ATFE to show cause why the license should not have been granted. The reason why a show cause proceeding pursuant to a mandamus petition is necessary is because the statute so requires it. This case is about the meaning of a statute–18 U.S.C. § 923(d)(2) which states:

> The Attorney General must approve or deny an application for a license within the 60-day period

> beginning on the date it is received. If the Attorney General fails to act within such period, the applicant may file an action under section 1361 of Title 28 to compel the Attorney General to act. If the Attorney General approves an applicant's application, such applicant shall be issued a license upon the payment of the prescribed fee.

Black's Law Dictionary refers to two types of mandamus proceedings. The first is called "alternative mandamus" because it gives the official the choice of either performing the mandatory duty, or showing cause why he will not. The second is called "peremptory mandamus" which absolutely commands the officer to act. The instant case presents the government with the first option–issue the license or show cause why Petitioner is not qualified to be licensed. Black's Law Dictionary, (8th ed. 2004).

II. This Case Presents Issues of Fundamental National Importance, i.e., Will Courts Follow Unambiguous Legislation or Judicial Legislation Embedded in Case Law?

A. The Federal Licensing Statute is Clear and Unambiguous

This is a case of statutory application - pure and simple. The statute is clear and unambiguous. It requires no interpretation or construction, only application by the Court. As in all statutory cases, the Court begins with the language of the statute. The first step to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). The

inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.

B. The Licensing Statute Provides no Discretion Regarding Timing to the ATFE Whatsoever

Title 18 U.S.C. § 923(d)(2) states:

> The Attorney General must approve or deny an application for a license within the 60-day period beginning on the date it is received. If the Attorney General fails to act within such period, the applicant may file an action under section 1361 of title 28 to compel the Attorney General to act.

It is undisputed that the Attorney General failed to approve and also failed to deny the application in the 60 day period as required by law. It is undisputed that Petitioner has filed a mandamus action. Having filed an action for mandamus as authorized by the clear and unambiguous language of 18 U.S.C. § 923(d)(2), Petitioner was entitled to have his mandamus petition heard by the District Court.

The government, however, wishing to avoid this possibility argued that the act of denying the application on November 24th, 2003, retroactively moots Petitioner's mandamus petition and renders "the court...without jurisdiction to hear the Petitioner's claim." In support of its argument, the ATFE presented case law to the effect that moot cases do not warrant the exercise of judicial power under the case or controversy provision of the Constitution, Article III. Moreover, the government contrasted the licensing requirement to another statute which provides, by operation of law, for the approval of a license governing operating permits for fuel use if not timely acted upon.

In order to foreclose the government from making the argument it makes, Congress reaffirmed the non-discretionary nature of the government's obligation in 18 U.S.C. § 923(d)(2). It stated that "[t]he Attorney General *must approve or deny* an application for a license within the 60-day period beginning on the date it is received." The law provides that he must approve or he must deny. The law does not provide that he may approve or deny. Not only does this section reaffirm the non-discretionary nature of the government's obligation, but it also mandates that the government approve or deny an application within 60 days. If the applicant does not meet the criteria, then the agency must deny the application. It has no discretion to do otherwise. It must approve or it must deny and it must do so in 60 days, but it may not do nothing, which is what it did here.

The question before the Court is not whether Petitioner was qualified pursuant to 18 U.S.C. § 923(d)(1), but whether or not the ATFE approved or disapproved the application in 60 days. There is no factual dispute that it failed to do so. The question then becomes what remedy did Congress extend to the Petitioner where the government fails to approve or disapprove within the 60 day window. Here is where the Sixth Circuit Court of Appeals erred.

C. The Executive Branch Must Follow the Non-Discretionary Timing of the Law or Face the Consequences Authorized by Congress

The non-discretionary 60 day window is mandated by Congress and Congress expects the executive branch to follow its mandates. When the executive branch fails to follow its mandates for whatever reason, Congress has provided a particular remedy. Congress has spelled this remedy out in

the statute. It is not left to guesswork or speculation or to the government to concoct a post-mortem legal remedy. The statute provides that "[i]f the Attorney General fails to act within such period, the applicant may file an action under section 1361 of Title 28 to compel the Attorney General to act." The applicant may compel the Attorney General to act.

What does this mean; "compel the Attorney General to act?" Does it mean to compel the Attorney General to act within the 60 day period established by statute? No. That would be absurd because the 60 day window is already past. The requirement that the Attorney General "act" is not met by going back to the statute regarding approval or denial. The government's failure to act accompanied by the Petitioner's mandamus action closes the doors on the government taking shelter under the statutory requirement that it act within 60 days.

The ATFE having failed to follow the rules, Congress now opens a new procedural door for the Petitioner. He need no longer wait while his business is in limbo. Congress has specified that Petitioner can obtain mandamus relief to compel the Attorney General to act on the application to either grant or deny it. Don't worry that Congress already mandated that the ATFE so act and that is already had its chance and blew it, says the government.

The Petitioner, however, argued that once mandamus relief is filed, the government is foreclosed from simply acting to grant or deny the application. Congress itself has directed that the government be required to "act" through the mandamus proceeding and all that it entails-i.e., that the government show cause why the license should not be issued. The government must show cause to the District Court then and there why the license should not be issued. That the

government cannot simply deny the license in a letter outside the mandamus action and thereby obtain a "Get out of Court Free" card, renders the entire statutory scheme meaningless. This is what Congress meant when it granted to Petitioner a right to seek mandamus relief to compel the government to "act." Adoption of the government's meaning, however, can only be embraced if the 60 day requirement were rendered meaningless through judicial construction of an unambiguous statute.

D. It is Petitioner, Not the Government, Who Enjoys Discretion in the Choice of Forums in Which He May Seek a Remedy for the Respondent's Five Month Delay

Turning to the mandamus remedial provision of the statute, one finds Congress gave discretion to the Petitioner and not the government in terms of choice of remedies. Congress gave the Petitioner the power of electing his own remedies and choice of forums. Congress gave the Petitioner the option to seek mandamus or wait until the agency found the time in its busy schedule to act, and then demand an administrative hearing pursuant to 18 U.S.C. §§ 923(f)(2) and (f)(3).

Congress has provided, at the Petitioner's discretion, a series of remedial options. Congress has not required that Petitioner exercise any one of them. But it has provided that where the government fails to approve or deny in 60 days, then Petitioner is entitled to mandamus. The District Court should have show caused the ATFE and held a show cause hearing accordingly.

Moreover, the licensing statute says nothing about administrative remedies. It imposes no requirement that the Petitioner exhaust administrative remedies. The statute says nothing about the procedure that applies where the government denies the application after a mandamus action is filed. The government has simply been flying under the procedural radar.

It is a general principle of statutory construction that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F. 2d 720, 722 (5th Cir. 1972)).

In this case, Congress chose to include the mandamus remedy granting the Petitioner the right to have his license considered before a District Court if the ATFE fails to act within 60 days in one section of the statute, and Congress provided another section of the law for an administrative remedy if the ATFE timely denied the license. To read the statute any other way would render the mandamus provision irrelevant. The Court must presume that Congress acted intentionally in establishing, at Petitioner's election, two possible remedies–one he could exercise at his will (mandamus), and one he could exercise after the government got around to following the law (administrative hearing).

CONCLUSION

No court may function as a legislature. The courts must not act as a second Congressional branch. Courts exist to interpret that which needs interpreting, not rewriting that which is written.

For the reasons stated, the Petitioner respectfully requests the Court to grant his petition for certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 04-1933

[Filed December 2, 2005]

KERRY L. MORGAN, Petitioner-Appellant,	)
v.	)
UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO & FIREARMS Respondent-Appellee.	)

Before CLAY and COOK, Circuit Judges;
OLIVER*, District Judge

ORDER

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due

* The Hon. Solomon Oliver, Jr., U.S. District Judge for the Northern District of Ohio, sitting by designation.

consideration thereof,

IT IS ORDERED that the judgment of the district court be, and it hereby is, AFFIRMED for reasons as stated on the record.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-74035

[Filed June 23, 2004]

KERRY L. MORGAN,	)
Petitioner,	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,	)
Respondent.	)
	)

OPINION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

Petitioner Kerry L. Morgan commenced this mandamus action on October 6, 2003, seeking to compel the Respondent United States Department of Justice, Bureau of Alcohol, Tobacco and Firearms ("ATF") to act upon his application for renewal of his Federal Firearms License ("FFL"). A few

weeks after this suit was brought, the ATF issued its decision, advising Petitioner that his application had been denied. Accordingly, in a motion filed on January 5, 2004, Respondent argues that this case should be dismissed as moot. For the reasons set forth below, the Court agrees.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Kerry L. Morgan is a resident of Redford Township, Michigan. He first obtained a Federal Firearms License ("FFL") in 1991. This license authorized Petitioner to conduct business as a Type 01 dealer in firearms from the designated location, which also was Petitioner's place of residence.

Petitioner's license was subject to renewal every three years, and he successfully renewed this license in 1994, 1997, and 2000. On June 26, 2003, he submitted an application to the Respondent Bureau of Alcohol, Tobacco and Firearms ("ATF") in order to again renew his FFL, which was due to expire on September 1, 2003. This application was accompanied by the required certification that "the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premises is located." 18 U.S.C. § 923(d)(1)(F)(i); see also 27 C.F.R. § 478.47(b)(6)(i).

Under the governing statute and corresponding federal regulation, the Attorney General or his designate "must approve or deny an application for a license within the 60-day period beginning on the date it is received." 18 U.S.C. § 923(d)(2); see also 27 C.F.R. § 478.47(c). If an application is not acted upon within this 60-day period, the applicant is authorized by statute to bring a mandamus action under 28

U.S.C. § 1361 to compel the agency to act. 18 U.S.C. § 923(d)(2); see also 27 C.F.R. § 478.47(d).

In this case, the 60-day period expired without the Respondent agency having taken any action upon Petitioner's renewal application. Accordingly, Petitioner commenced this mandamus action on October 6, 2003, seeking to compel the ATF to act upon his application. Apart from this relief, Petitioner also seeks an affirmative declaration by the Court that he has met all of the qualification for renewal of his FFL, and that he therefore is entitled to a favorable decision on his application.

On November 24, 2003, a few weeks after this suit was brought, the Respondent ATF advised Petitioner that his application had been denied. In support of this decision, the ATF explained that "[o]ur investigation reveals that dealing in Firearms from your premises would be in violation of local zoning laws." (Respondent's Motion, Ex. C.) In arriving at this view of local zoning laws, the ATF relied upon the opinion of counsel for Redford Township, Petitioner's place of residence, that "the sale of firearms from a home in a residential district is not a permitted use in Redford Township." (Respondent's Motion, Ex. A, 9/23/2003 Letter from Township Counsel; see also Respondent's Motion, Ex. B, 10/15/2003 Letter from Township Counsel.)

In light of this decision upon Petitioner's application, albeit an unfavorable one, Respondent now contends that Petitioner's plea for mandamus relief should be denied as moot. Next, to the extent that Petitioner claims an entitlement to a renewed FFL, Respondent argues that he must first exhaust his administrative remedies before seeking judicial review. Finally, in the event that the Court reaches the merits of the ATF's denial of Petitioner's application, Respondent

argues that this agency decision is entitled to deference. The Court agrees with the first two contentions, and thus need not address the third.

III ANALYSIS

A. Petitioner's Request for Mandamus Relief Is Moot.

As its first argument in its motion to dismiss, Respondent argues that Petitioner's plea for mandamus relief is moot, in light of the ATF's November 24, 2003 decision to deny Petitioner's renewal application. The Court agrees.

As noted earlier, Petitioner's request for mandamus relief in this case rests upon Respondent's failure to act upon his FFL renewal application within sixty days, as required under the governing federal statute and corresponding federal regulation. See 18 U.S.C. § 923(d)(2); 27 C.F.R. § 478.47(c). "A writ of mandamus is an extraordinary remedy, and is intended to provide a remedy only if the plaintiff has exhausted all other avenues of relief and the defendant owes the plaintiff a clear nondiscretionary duty." Willis v. Sullivan, 931 F.2d 390, 395 (6th Cir. 1991). Here, of course, Petitioner is in a somewhat better position to seek this extraordinary remedy, by virtue of an express statutory authorization for mandamus relief when the ATF fails to timely act upon an application for a license. See 18 U.S.C. § 923(d)(2).

Nonetheless, this statutory grant of the remedy of mandamus is carefully limited. Specifically, the statute and corresponding regulation provide that a mandamus action may be brought "to compel ATF to act upon the application." 27 C.F.R. § 478.47(d); see also 18 U.S.C. § 923(d)(2) (authorizing a mandamus action "to compel the Attorney

General to act"). The nondiscretionary duty owed to an applicant, in other words, is to *act upon* an application, and not to *grant* it.[1] Here, it is undisputed that the ATF has acted upon Petitioner's renewal application, denying it in a decision dated November 24, 2003. Hence, the mandamus relief authorized under the statute is no longer warranted, because Respondent already has taken the action that a writ of mandamus would compel. The Court finds, therefore, that Petitioner's plea for mandamus relief is moot.

In seeking to avoid this result, Petitioner argues that the nondiscretionary duty owed to him by the ATF is not merely to act upon his FFL renewal application, but to grant it. In particular, Petitioner points to the statutory language that an application "shall be approved" if various conditions are met, 18 U.S.C. § 923(d)(1); see also 27 C.F.R. § 478.47(b), and he contends that he has satisfied all of these prerequisites. Under these circumstances, Petitioner maintains that a writ of mandamus is warranted to ensure that Respondent performs its nondiscretionary statutory obligation to approve his application.

As observed earlier, however, one of the prerequisites to mandamus relief is that the petitioner "has exhausted all other avenues of relief." Willis, 931 F.2d at 395. Here, Respondent argues that administrative avenues of relief remain available for Petitioner to challenge the denial of his FFL application. Accordingly, the Court turns to this issue.

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[1] As noted by Respondent, other federal statutes explicitly provide that a failure to timely act upon an application operates as an approval. See, e.g., 26 U.S.C. § 5181 (c)(2)(B). Section 923(d)(2), in contrast, lacks any such provision.

B. Petitioner Must Exhaust His Administrative Remedies Before Seeking Judicial Review.

In the event that an application for a FFL is denied, the governing statute provides that the Attorney General "shall, upon request by the aggrieved party, promptly hold a hearing to review his denial." 18 U.S.C. § 923(f)(2); see also 27 C.F.R. § 478,72 (providing that a request for a hearing must be filed "within 15 days after receipt of the notice of denial"). Petitioner was specifically informed of this right of administrative review in the November 24, 2003 notice setting forth the ATF's denial of his application. (See Respondent's Motion, Ex. C.) In a letter dated December 1, 2003, Petitioner timely sought review of the agency's decision, and this administrative appeal presumably is still pending.[2]

Under these circumstances, the Court readily concludes that Petitioner must pursue his administrative avenues of relief to completion before he may obtain judicial review. This result is dictated by the plain language of the pertinent federal statute:

> If after a hearing held under [18 U.S.C. § 923(f)(2)] the Attorney General decides not to reverse his decision to deny an application.... the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides

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[2] As Respondent points out, Petitioner's FFL remains in effect so long as this administrative appeal is pending. See 27 C.F.R. § 478.78.

> or has his principal place of business for a de novo judicial review of such denial. . . .

18 U.S.C. § 923(f)(3); see also 27 C.F.R. 478.78. In accordance with this congressional command, Petitioner's right of judicial review arises only in the event that the ATF declines to reverse its decision on administrative appeal. This prerequisite to suit has not yet occurred.

Petitioner fails to suggest any reason why this usual rule of administrative exhaustion should not apply here. Contrary to Petitioner's blanket assertions that the governing statute "imposes no requirement that the Petitioner exhaust administrative remedies," and indeed "says nothing about administrative remedies." (Petitioner's Response at 14), the Court views the language of § 923(t)(2) and (3) as unmistakably clear on this point. Moreover, even in the absence of such a requirement, the mere availability of such administrative remedies would counsel against a grant of the "extraordinary remedy" of a writ of mandamus. Petitioner does not claim that he is precluded from raising his substantive arguments during the course of his administrative appeal -- and, indeed, his December 1, 2003 request for a hearing raises many of the same issues he has presented before this Court.

In light of this still-available avenue of administrative relief, the Court finds no basis for addressing Petitioner's substantive challenges to the ATF's denial of his FFL application. It remains possible, after all, that the ATF will reverse itself on administrative appeal, and determine that Petitioner's application should have been granted, if, on the other hand, the ATF adheres to its initial decision, Petitioner will have an undisputed, statutory right of judicial review, and the reviewing court will have the benefit of the agency's

views on the substantive challenges raised by Petitioner. Because this is the central purpose of administrative exhaustion, and because Congress has expressly established an administrative review process for those aggrieved by an adverse ATF decision on an application for a federal firearms license, the Court readily concludes that petitioner must pursue this administrative avenue to completion before he may seek redress in a judicial forum.

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's January 5, 2004 Motion to Dismiss is GRANTED.

/s/ _____
Gerald E. Rosen
UNITED STATES DISTRICT JUDGE